Supreme Court, U.S.
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No. 97-461

In The

# Supreme Court of the United States

October Term, 1997

WISCONSIN DEPARTMENT OF CORRECTIONS,
*et al.*

*Petitioners,*

v.

KEITH D. SCHACHT,

*Respondent.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

## BRIEF FOR PETITIONERS ON THE MERITS

JAMES E. DOYLE
Attorney General
RICHARD BRILES MORIARTY*
Assistant Attorney General
Wisconsin Department of Justice
123 West Washington Avenue
Madison, Wisconsin 53707
Telephone: (608) 267-2796
Counsel for Petitioners

*Counsel of Record

50pp

## QUESTION PRESENTED

Where a plaintiff never objects to removing a civil action asserting only federal claims under 42 U.S.C. § 1983, must an appellate court, on its own motion, vacate judgment for defendants, and remand the entire action to State court, simply because the plaintiff included claims which any court would have dismissed?

## LIST OF PARTIES

Respondent, KEITH D. SCHACHT (referred to as "Schacht"), sued petitioner, WISCONSIN DEPARTMENT OF CORRECTIONS (referred to as "the Department"). He also sued the remaining petitioners, CATHERINE J. FARREY, CYNTHIA O'DONNELL, RITA SMICK, THOMAS LALIBERTE, RANDALL HEPP, and ONE OR MORE JOHN DOES, (referred to as "the remaining defendants") in their individual and official capacities as employes of the Department's Oakhill Correctional Institution. Schacht did not amend his pleadings to identify any unnamed defendant. The district court denied his attempt, through a brief filed shortly before the trial date, to add another Oakhill employe, B.J. MIKKLESON, as a defendant.



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WISCONSIN DEPARTMENT OF CORRECTIONS,
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KEITH D. SCHACHT,

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

## BRIEF FOR PETITIONER ON THE MERITS

By creating, without any valid legal support, a vast exception to the removal statutes, the Seventh Circuit decision cast aside a reasoned district court judgment on the merits, vital constitutional and statutory guarantees and effective judicial administration. The decision below, in this removed action asserting only federal claims under 42 U.S.C. § 1983, vacated judgment for defendants, and remanded the entire case to State court, solely because Schacht, who never objected to removal, made Section 1983 claims against the State that were subject to a sovereign immunity defense.

Whenever a plaintiff makes a Section 1983 claim in a State court action, the defendants have a right to remove to federal court. 28 U.S.C. §§ 1331, 1343(a)(3) and 1441. Because the State could assert an Eleventh Amendment immunity defense to claims made against it, the decision below punished the State, and State officials sued personally, by making their joint right of removal contingent on the State surrendering its constitutional entitlement to Eleventh Amendment immunity.

The decision below was flawed on many levels. The district court had removal jurisdiction simply because, had Schacht filed in district court, it would have had original jurisdiction of the individual capacity claims. City of Chicago v. International College of Surgeons, 118 S.Ct. 523 (1997). Since a State is not a "person" under Section 1983, it was both unnecessary and improper to consider Eleventh Amendment immunity in analyzing the propriety of removal. Will v. Michigan Dep't of State Police, 491 U.S. 58 (1989). Regardless, a potential Eleventh Amendment immunity defense, unlike certain jurisdictional bars, only affects federal court jurisdiction when, and to the extent, it is raised and pressed by the State. Since the defense is for States, not federal courts, to use and control (Patsy v. Board of Regents, 457 U.S. 496 (1982)), it can never deprive either States, or other defendants sued with States, of their removal rights.

While acknowledging that the Section 1983 claims against a State are so defective that Wisconsin courts will unquestionably dismiss them, the Seventh Circuit decision deemed those claims poisonous to removal jurisdiction and voided the extensive district court proceedings and sent the parties back to the State circuit court to start over. The decision below allows plaintiffs making purely federal claims to deprive States, State officials sued personally -- and even defendants unconnected with any State unfortunate enough to be joined as defendants -- of minimal removal rights granted by Congress.



All a plaintiff need do to avoid a federal court forum and frustrate Congressional intent, though making purely federal claims, is include a baseless claim against which an Eleventh Amendment immunity defense could be interposed. This turns both States, and any defendants joined with States, into second-class litigants and transforms the shield of Eleventh Amendment immunity into a sword which plaintiffs can unilaterally use against them. The decision below twists federal constitutional and statutory guarantees beyond recognition, encourages abusive pleading practices and should be reversed.

## OPINIONS BELOW

The decision below is reported (Schacht v. Wisconsin Department of Corrections, 116 F.3d 1151 (7th Cir. 1997)) and reprinted at J.A. 35-40. The district court opinion is unreported and reprinted at J.A. 27-34.

## JURISDICTION

This action asserting federal claims was timely removed from State court. (J.A. 1, 6, 8-9.) The district court had jurisdiction. 28 U.S.C. §§ 1331, 1343(a)(3) and 1441. Schacht appealed from a district court judgment against him. (J.A. 27-34.) The appellate court had jurisdiction. 28 U.S.C. § 1291. The appellate court decision issued on June 17, 1997 (J.A. 35) and the petition, filed on September 12, 1997, was granted on January 16, 1998. The appellate court vacated the judgment and directed a remand to the State court. (J.A. 40.) This Court has jurisdiction. 28 U.S.C. § 1254(1). *See* Grubbs v. General Electric Credit Corp., 405 U.S. 699, 700 (1972).

## CONSTITUTIONAL PROVISIONS AND STATUTES AND RULES INVOLVED

U.S. Const. amend. XI provides:

> The Judicial Power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

U.S. Const. amend. XIV provides, in pertinent part:

> Section 1. . . . No State shall . . . deprive any person of life, liberty, or property, without due process of law; . . . .
>
> . . .
>
> Section 5. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.

Wis. Const. art. IV, § 27 provides:

> **Suits against state.** SECTION 27. The legislature shall direct by law in what manner and in what courts suits may be brought against the state.

28 U.S.C. § 1331 provides:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.



28 U.S.C. § 1343(a)(3) provides:

> **(a)** The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> . . . .
>
> **(3)** To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

28 U.S.C. § 1441 provides, in pertinent part:

> **(a)** Except as otherwise expressly provided by Act of Congress, any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division embracing the place where such action is pending . . . .
>
> **(b)** Any civil action of which the district courts have original jurisdiction founded on a claim or right arising under the Constitution, treaties or laws of the United States shall be removable without regard to the citizenship or residence of the parties . . . .

28 U.S.C. § 1447(c) provides, in pertinent part:

> **(c)** . . . If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded. . . .

42 U.S.C. § 1983 provides, in pertinent part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .

Rule 12(b) of the Federal Rules of Civil Procedure, provides, in pertinent part:

> **(b)** . . .[T]he following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted . . . .

Rule 802.06(2)(a), Wis. Stats., provides, in pertinent part:

> **(2)** . . . (a) . . . [T]he following defenses may at the option of the pleader be made by motion:
>
> . . .
>
> 6. Failure to state a claim upon which relief can be granted.



## STATEMENT OF THE CASE

Schacht sought monetary relief in Wisconsin circuit court, under 42 U.S.C. § 1983 (Section 1983), asserting that the Department and the remaining defendants breached the Due Process Clause of the Fourteenth Amendment to the United States Constitution, U.S. Const. amend. XIV, by suspending his State employment without pay in January 1993 and discharging him for work rule violations in February 1993. (J.A. 1, 6, 27, 30, 35.) The Department and the remaining defendants removed the action to federal court. (J.A. 8-16.)

The parties agreed that the central facts were undisputed and that only due process issues were presented for resolution. (J.A. 17-26.) Citing immunity secured by the Eleventh Amendment to the United States Constitution, U.S. Const. amend. XI, the district court dismissed claims against the Department and official capacity claims against the remaining defendants. (J.A. 28.) It denied a request to name a new defendant, found no substantive due process claims were pled, and granted summary judgment to the remaining defendants on the individual capacity claims. (J.A. 27-32.) On appeal, Schacht did not challenge the dismissal of the claims against the Department or of the official capacity claims.

Schacht never questioned the propriety of removal until the Seventh Circuit, during oral argument following briefing on the merits, raised the issue on its own initiative and called for supplemental briefs. (J.A. 37, 39.) The Seventh Circuit held that the potential, at time of removal, that Eleventh Amendment immunity might bar some claims had deprived the district court of removal jurisdiction. (J.A. 35-40.) The decision below concluded that the potential, at time of removal, that the State could chose to bar some claims through Eleventh Amendment immunity meant the district court could not fully adjudicate every claim Schacht made. (J.A. 37-40.) The

Seventh Circuit characterized that potential as an "Achilles' heel" which rendered removal jurisdiction over this action void from the outset. (J.A. 37-40.) It vacated the judgment against Schacht and required remand to the State court. (J.A. 35-40.) The district court complied. (J.A. 41.) The State court stayed the action pending disposition of defendants' request for review by this Court. (J.A. 42.)

## SUMMARY OF THE ARGUMENT

The decision below turned on reasoning contrary to principles this Court has carefully developed and articulated. Erroneously assuming that, because Schacht pled Section 1983 claims subject to State sovereign immunity, the district court lacked removal jurisdiction, the decision below actually used the State's immunity from suit to subject the State and the remaining defendants, sued both officially and personally, to relitigation of this entire case. The decision below is flawed no matter how deeply it is probed.

1. Had this action commenced in the district court, it would have had original jurisdiction over the individual capacity claims. That, by itself, sufficed to invoke removal jurisdiction.

2. Section 1983 claims against States are always fatally defective for the nonjurisdictional reason that a State is not a "person" under that statute. It was, therefore, unnecessary and improper to question the effect of Eleventh Amendment immunity on the removal of Section 1983 claims against a State.

3. Eleventh Amendment immunity is a defense for States, not federal courts, to raise. It cannot bar States, much less defendants involuntarily joined with States, from exercising their right of removal.



4. Without any valid legal support, the decision below required a State court remand, and relitigation of this action, because Schacht pled claims which, the Seventh Circuit acknowledged, would also unquestionably be dismissed by the State court.

This is no way to run a judicial system. State governments, sharing sovereignty with the federal government, deserve special constitutional consideration whenever they are involuntarily sued for alleged violations of federal law. The decision below instead allows plaintiffs, by including federal claims so defective they would be dismissed by any court, to unilaterally deprive States, and defendants unfortunate enough to be joined with States, of minimal removal rights which Congress intended to grant all defendants. All a plaintiff need do to avoid having federal courts resolve federal law claims, under the Seventh Circuit reasoning, is assert one base'ess claim which Eleventh Amendment immunity could bar.

Eleventh Amendment immunity should never be transformed from a shield appropriate to a fellow sovereign in a federal system into a sword which either federal courts or plaintiffs may use to reduce States, and those defendants joined with States, to second-class litigants.

## ARGUMENT

**In a removed action asserting only federal claims under 42 U.S.C. § 1983, an appellate court should not, based on the plaintiff having included claims against a State, vacate judgment for defendants, and remand the entire action to State court.**

### I. Removal jurisdiction exists if the district court has federal question jurisdiction over just one claim.

When a plaintiff, as here, never objects to removal and the district court proceeds to judgment, "the issue in subsequent proceedings on appeal is not whether the case was properly removed, but whether the federal district court would have had original jurisdiction of the case had it been filed in that court." Grubbs, 405 U.S. at 702. Removal jurisdiction grounded on the existence of federal questions is determined as of the time of removal. *E.g.*, NPSA Service Corp. v. Independent American Savings, 868 F.2d 1415, 1417 (5th Cir. 1989). *See also* Saint Paul Mercury Indemnity Co. v. Red Cab Co., 303 U.S. 283, 292-93 (1938).

Had Schacht filed this action in federal district court, it would have had jurisdiction over the individual capacity claims on which the appeal focused. *E.g.*, Moor v. County of Alameda, 411 U.S. 693, 712 (1973) *citing* Monroe v. Pape, 365 U.S. 167 (1961). When this action was removed, those individual capacity claims sufficed to invoke removal jurisdiction since they required resolution of substantial questions of federal law. *E.g.*, City of Chicago, 118 S.Ct. at 530. The Department and the remaining defendants had to join together to remove since



only a single controversy was alleged. *E.g.*, Chicago, R.I. & P. Ry. Co. v. Martin, 178 U.S. 245, 247-48 (1900).

The Seventh Circuit decision dramatically deviated from the Grubbs standard. It instead relied on a line of its own holdings in other decisions, rejected in City of Chicago last December, which characterized removal jurisdiction as dependent on district courts having power over each claim pled in removed actions. (J.A. 37-38 citing Frances J. v. Wright, 19 F.3d 337 (7th Cir. 1994), *reh. and reh. en banc denied*, *cert. denied*, 513 U.S. 876 (1994); Gorka by Gorka v. Sullivan, 82 F.3d 772, 773 (7th Cir. 1996), *reh. and reh. en banc denied*; Intern. College of Surgeons v. City of Chicago, 91 F.3d 981 (7th Cir. 1996), *rev'd and remanded*, City of Chicago v. International College of Surgeons, 118 S.Ct. 523 (1997).)

The decision below declared that a district court has jurisdiction in a removed action "only where the district court has the authority to adjudicate all of the claims" and that, to make removal proper, the district court "must" have had the power to "determine all the issues in the case." (J.A. 37.) While the district court may well have had the power to adjudicate all of the claims made by Schacht, that is irrelevant. Original jurisdiction under 28 U.S.C. §§ 1331, 1343(a)(3) and 1441 instead refers to the district court's threshold ability to consider a civil action, not whether some claims may be jurisdictionally flawed from the outset or fall by the wayside before full adjudication on the merits. Grubbs, 405 U.S. at 702; City of Chicago, 118 S.Ct. at 530.

Removal was more clearly proper here than in City of Chicago. The plaintiffs in City of Chicago asserted both federal and state law claims and refrained from relying on Section 1983 in commencing their state court action. City of Chicago v. International College of Surgeons, 118 S.Ct. 534, 537 and 540 (1997) (Ginsburg and Stevens, JJ., dissenting). By contrast, Schacht pled only claims under

the United States Constitution and sought relief only under Section 1983. (J.A. 1, 6, 27, 30, 35.) The district court had jurisdiction over all of Schacht's claims since they alleged violations of the United States Constitution and were brought under Section 1983. 28 U.S.C. §§ 1331, 1343(a)(3) and 1441.

The State court would plainly have dismissed all but the individual capacity claims, based on Will or sovereign immunity or both. (Pp. 27-28 *infra*.) It was particularly egregious for the Seventh Circuit to reach out and require the remaining defendants, after they definitively showed that the claims Schacht pursued against them on a personal basis were factually unsupported (J.A. 17-26, 28-32), to start all over again in State court. These State officials will again be distracted from their public duties to defend themselves against Schacht's baseless claims.

The Seventh Circuit error did not arise from subtle anomalies in how Schacht pled his claims. It arose from the Seventh Circuit having completely misconstrued, in a series of decisions starting with Frances J., numerous constitutional and statutory principles. A few hypotheticals recasting how Schacht might have pled this action demonstrate the magnitude of the error in the decision below.

Removal jurisdiction would have been invoked if the district court only had federal question jurisdiction over one of several removed claims. If this action had commenced in district court, and Schacht made only one Section 1983 individual capacity claim and some State law claims, original jurisdiction would plainly have existed over the individual capacity claim. *E.g.*, Moor, 411 U.S. at 712. Just one claim presenting a substantial federal question suffices to create removal jurisdiction. City of Chicago, 118 S.Ct. at 530 (state law claims could not make removal improper since the "federal claims suffice to make the



actions 'civil actions' within the 'original jurisdiction' of the district courts for purposes of removal. § 1441(a).") Where a plaintiff "asserts a substantial claim" under a federal statute, "that assertion alone is sufficient to empower the District Court to assume jurisdiction over the case and determine whether, in fact, the [statute] does provide the claimed rights" and the district court then has "'power to determine whether it was or was not well founded in law and in fact.'" Romero v. International Term. Operat. Co., 358 U.S. 354, 359 (1959), *reh. denied*, 359 U.S. 962.

Had Schacht pled Section 1983 claims only against the State, included no individual capacity claims and made State law claims, that would not have defeated removal. In that scenario, the district court could have abstained, either by dismissing the federal claims, because a State is not a "person" under Section 1983 (pp. 15-19 *infra*), and remanding the remaining State law claims or by remanding the entire case. *E.g.*, Huffman v. Pursue, Ltd., 420 U.S. 592, 603-08 (1975). The Section 1983 claims, however, though flawed for nonjurisdictional reasons (pp. 15-19 *infra*), would have raised federal questions and sufficed to invoke removal jurisdiction. City of Chicago, 118 S.Ct. at 530.

Removal jurisdiction would also have been invoked if the sole federal question raised by Schacht had arisen from a claim, other than under Section 1983, on which the district court necessarily had to reach Eleventh Amendment immunity. Federal question claims may be based on a federal statute which, though arguably including the State as a suable entity, does so without the clarity necessary to abrogate Eleventh Amendment immunity. *E.g.*, Dellmuth v. Muth, 491 U.S. 223, 231-32 (1989); Employees v. Missouri Dep't of Public Health and Welfare, 411 U.S. 279, 285 (1973). In that scenario, though a claim against the State might be subject to dismissal only on Eleventh Amendment immunity grounds, a federal question is presented (*e.g.*, Idaho v. Couer d'Alene

Tribe of Idaho, 117 S.Ct. 2028, 2033 (1997); Romero, 358 U.S. at 359) and removal jurisdiction exists (*e.g.*, City of Chicago, 118 S.Ct. at 530).

States and their officials should have at least the same rights as other litigants, when involuntarily brought into court on federal claims, to choose whether to remove to federal court. 28 U.S.C. § 1441. Where removal is based on federal question jurisdiction, it turns on whether claims arise under the Constitution and laws of the United States rather than "the character of the parties." Ames v. Kansas, 111 U.S. 449, 470-72 (1884) (removal of action filed by a State is treated like other removed actions). *See also* Illinois v. City of Milwaukee, 406 U.S. 91, 100-101 (1972). Yet the decision below precludes removal of actions asserting solely federal claims because, based on the character of a defendant being a State, sovereign immunity loomed as a potential reason to dismiss some claims. The decision below deprives States, and any defendants sued with States, of removal rights granted to all defendants.

Removal jurisdiction based on federal question jurisdiction is governed by the same principles which apply when actions commence in district court. That a defendant removing an action is a State or State official is simply irrelevant to determining whether the district court has federal question jurisdiction when the action is removed.

The Seventh Circuit, questioning whether the district court had removal jurisdiction, should have quickly answered its own question, by noting the jurisdictional effect of the individual capacity claims, and moved on to the merits of the appeal. Instead, tossing this Court's detailed maps overboard, it launched a boat onto the open seas and rapidly became adrift. Lost, with only its own inadequate charts providing direction, the Seventh Circuit viewed Eleventh Amendment immunity as a threatening specter which must be purged before removal jurisdiction can be invoked. Had it retained and hewed to this Court's



maps, Eleventh Amendment immunity would have been neither viewed as a threat nor encountered at all. This Court's directions would have rapidly led the Seventh Circuit back to port after a brief side trip, to verify that a State is not a "person" under Section 1983, confirmed that removal jurisdiction was proper and that the merits of the appeal should be reviewed.

## II. Section 1983 claims against a State need never be dismissed on Eleventh Amendment immunity grounds since a State is not a "person" under Section 1983.

The Seventh Circuit decision, in transforming the potential that Eleventh Amendment immunity defenses could be raised against Section 1983 claims into defects in jurisdiction at time of removal, ignored a critical analytical stopper. When examining claims against States under Section 1983, federal courts need never consider Eleventh Amendment immunity issues since, as a nonjurisdictional matter, a State is simply not a "person" under Section 1983. Arizonans for Official English v. Arizona, 117 S.Ct. 1055, 1069-70 (1997). The Court reiterated its prior messages that:

> § 1983 actions do not lie against the State [citation omitted]. . . . The barrier [to the § 1983 claims] was not, as the Ninth Circuit [in Arizonans] supposed, Eleventh Amendment immunity, which the State could waive. **The stopper was that § 1983 creates no remedy against a State.**

117 S.Ct. at 1069-70, emphasis added. The claims against the Department, and the official capacity claims against the remaining defendants which sought only monetary relief (J.A. 6), were claims against the State. 117 S.Ct. at

1070, n.24. While dismissal of these claims was predictable at time of removal, there was no need to consider the "barrier" of Eleventh Amendment immunity since the defect was simply that Section 1983 claims cannot be made against a State. 117 S.Ct. at 1069-70.

While citing Arizonans for Official English for the propositions that Section 1983 actions do not lie against States and that courts cannot overlook jurisdictional defects (J.A. 39), the Seventh Circuit itself overlooked the most relevant statement: that the jurisdictional immunity issues need not be considered at all since the "stopper was that § 1983 creates no remedy against a State" (117 S.Ct. at 1069-70). In earlier decisions, the Seventh Circuit recognized that Section 1983 claims against States can instead be dismissed because "[p]ersonhood is an essential element of a § 1983 claim" and "a state is not a 'person' for purposes of § 1983." Lett v. Magnant, 965 F.2d 251, 255 (7th Cir. 1992), *reh. and reh. en banc denied*. When a removed action contains a Section 1983 claim subject to dismissal based on Eleventh Amendment immunity, a federal court need look, and should look, no farther than this definitional bar. Eleventh Amendment immunity could, as a bar to a Section 1983 claim against a State, ultimately drop away based on waiver. Arizonans for Official English, 117 S.Ct. at 1069-70. The critical "stopper" is definitional, not jurisdictional: Congress simply never intended to include States within its definition of "person" in Section 1983. *E.g., id.*, 117 S.Ct. at 1069-70.

This distinction was first sharpened in Will, which examined whether Section 1983 claims could be made against a State in its own courts where Eleventh Amendment immunity is unavailable. 491 U.S. at 63-64. In that setting, Will could expressly separate Eleventh Amendment jurisdictional analysis from the definitional analysis and focus completely on determining Congressional intent through a detailed study of applicable legislative history. 491 U.S. at 64-66. Though Will



considered the existence of Eleventh Amendment immunity, and Congress' presumed respect for it, as confirmation that Congress intended to exclude States from the definition of "person," it established that the definitional bar stood on its own, separate from a State's sovereign immunity, to defeat any Section 1983 claim -- whether in federal **or** State court -- made against a State. 491 U.S. at 66-70. *See also* Howlett v. Rose, 496 U.S. 356, 383 (1990) (reiterating that Congress, "in excluding States and arms of the State from the definition of person" in Section 1983, merely considered immunity principles ).

Will underscored that these analyses were separate by leading off its citation to contrary lower court decisions, i.e., those which had "taken the position that a State is a person" under Section 1983, with Della Grotta v. State of R.I., 781 F.2d 343 (1st Cir. 1986). Will, 491 U.S. at 61, n.3. Significantly, Della Grotta had concluded the State was, in that case, a person for Section 1983 purposes **because** it had waived Eleventh Amendment immunity. 781 F.2d at 348-49. The dissent in Will criticized the majority for separating the two analyses and for rejecting the Della Grotta rationale:

> To describe the breadth of the Court's holding is to demonstrate its unwisdom. If States are not "persons" within the meaning of § 1983, then they may not be sued under that statute regardless of whether they have consented to suit. **Even if, in other words, a State formally and explicitly consented to suits against it in federal or state court, no § 1983 plaintiff could proceed against it because States are not within the statute's category of possible defendants.**
>
> This is indeed an exceptional holding. . . . [I]t also renders ineffective the

choices some States have made to permit such suits against them. See, e.g., Della Grotta v. Rhode Island, 781 F.2d 343 (CA1 1986). . . .

Will v. Michigan Dept. of State Police, 491 U.S. 71, 85-86 (1989) (Brennan, Marshall, Blackmun and Stevens, JJ., dissenting), emphasis added. Nothing in the majority opinion suggests that the dissent misread its holdings. Will instead established this definitional analysis as a bar to Section 1983 claims against the States entirely separate from Eleventh Amendment immunity. 491 U.S. at 60-71.

The following term, Ngiraingas v. Sanchez, 495 U.S. 182 (1990) confirmed that the definitional analysis should precede any immunity analysis. Examining whether Section 1983 claims could be made against Territories, Ngiraingas both reemphasized the distinction between these two analyses and clarified that the definitional analysis should be conducted first. 495 U.S. at 183-92. Noting that the appellate court, after concluding that statutory construction excluded any Territory from the meaning of "person" in Section 1983, had not examined Eleventh Amendment immunity (495 U.S. at 185, n.2), the majority, despite criticism by the dissent, also looked first to the definition of "person" in Section 1983 and expressly refrained from any Eleventh Amendment analysis (495 U.S. at 192, n.12).

The Ngiraingas dissent argued for a contrary methodology of examining whether a Territory was entitled to Eleventh Amendment immunity before conducting any definitional analysis. Ngiraingas v. Sanchez, 495 U.S. 193, 202-03 (1990) (Brennan & Marshall, JJ., dissenting). Finding no immunity, they declared their disagreement with the majority: that "the absence of any immunity on the part of Territories from congressional enactments" should have led to a conclusion that a Territory, unlike a State, is a "person" under Section 1983. Ngiraingas, 495



U.S. at 193 (Brennan & Marshall, JJ., dissenting.) Despite these admonitions, the majority consciously refrained, in explaining its decision, from addressing any immunity issues. Ngiraingas, 495 U.S. at 183-92. Indeed, once that definitional analysis resulted in the conclusion that the Territory of Guam was not a "person" under Section 1983, the Court went no further since that "conclusion ma[de] it **unnecessary** to consider Guam's claim of immunity under the Eleventh Amendment." Ngiraingas, 495 U.S. at 192, n.12, emphasis added.

For the decision below to view Eleventh Amendment immunity as an absolute bar to removal was unnecessary and contrary to this Court's designated methods of analysis. If it examined the propriety of removal at all, the decision below should have recognized that, as a definitional and non-jurisdictional matter, Section 1983 claims cannot be made against States and then turned to the merits of the appeal. *E.g.*, Kruse v. State of Hawai'i, 68 F.3d 331, 334 (9th Cir. 1995) (holding that removed Section 1983 claims to which Eleventh Amendment immunity might apply should be dismissed, rather than remanded to State courts, because a State is not a "person" under Section 1983); Office of Hawai'ian Affairs v. Department of Educ., 951 F.Supp. 1484, 1489-90 (D. Hawai'i 1996).

Will, Ngiraingas and Arizonans for Official English clearly signaled that the definitional bar to Section 1983 claims against the State precluded any need to consider Eleventh Amendment immunity. Even if Eleventh Amendment immunity were reached, however, just as the decision below failed to heed those signals on how to analyze Section 1983 claims against States, it also overlooked this Court's directions on how to analyze Eleventh Amendment immunity.

## III. Eleventh Amendment immunity defenses are for States to use and control and can never defeat removal jurisdiction.

The Seventh Circuit, asked to review only how the district court had resolved Schacht's individual capacity claims, instead questioned the propriety of removal because Eleventh Amendment immunity was, at time of removal, a potential basis to dismiss other claims. (J.A. 37-38.) The decision below apparently deemed Eleventh Amendment immunity a jurisdictional bar which rendered the district court, in the words of Idaho, "altogether disqualified from hearing certain suits brought against a State." 117 S.Ct. at 2033 (holding that this interpretation "has been neither our tradition nor the accepted construction of the [Eleventh] Amendment's text.")

The Seventh Circuit looked at removal jurisdiction through the wrong end of the eyeglass: examining what the district court could, and did, do after removal rather than whether it had jurisdiction when the case was removed. *E.g.*, NPSA Service Corp., 868 F.2d at 1417; Saint Paul Mercury Indemnity Co., 303 U.S. at 292-93. For the district court to have, at time of removal, remanded because it determined that an Eleventh Amendment immunity defense could prevent otherwise valid federal claims from being adjudicated would have been improper. Though it could have safely predicted, after removal, that the Section 1983 claims against the State would not be tried, those claims unquestionably presented federal questions. Regardless, dismissal, on the nonjurisdictional basis that a State is not a "person" under Section 1983 precluded any need for Eleventh Amendment analysis. Even if a district court is certain, at time of removal, that the only bar to federal claims against a State would be Eleventh Amendment immunity, the claims still present substantial federal questions and support removal jurisdiction. *E.g.*, City of Chicago, 118 S.Ct. at 530.



For the Seventh Circuit to order remand, based on its retroactive conclusion that the district court lacked removal jurisdiction because of a potential Eleventh Amendment bar, was improper. The Seventh Circuit recognized elsewhere that this potential bar is irrelevant to whether a district court has jurisdiction over an action and that it is instead a defense for States, not federal courts, to use and control:

> The doctrine of Eleventh Amendment immunity, though often characterized as jurisdictional, does not function as a true jurisdictional bar. Unlike other forms of subject-matter jurisdiction, Eleventh Amendment immunity can, for example, be waived by consent. [Citation omitted.] The Supreme Court has declared, moreover, that "we have never held that [the Eleventh Amendment] is jurisdictional in the sense that it must be raised and decided by this Court on its own motion."

Komyatti v. Bayh, 96 F.3d 955, 959 n.4 (7th Cir. 1996), *quoting* Patsy, 457 U.S. at 516, n. 19. *See also* Benning v. Bd. of Regents of Regency Universities, 928 F.2d 775, 777, n. 2 (7th Cir. 1991), *as amended, reh. and reh. en banc denied* ("We are not obliged to reach the Eleventh Amendment issue" because, for example, States can waive it by consent). Eleventh Amendment immunity is, by its unique nature, a shield States, not federal courts, control. A State may, at its discretion, use that shield to block a claim entirely, interject it at various times during a federal action, or decline to invoke it at all. Patsy, 457 U.S. at 516, n. 19 (while noting that the State first raised Eleventh Amendment on appeal, never argued it and declined the Court's suggestion of resolution on those grounds, resolving case on other bases and confirming that "[n]othing in this opinion precludes the Board of Regents from raising its Eleventh Amendment claim on remand. . . . ").

Nonetheless, some courts, including panels of the Seventh Circuit, read Pennhurst State School & Hospital v. Halderman, 465 U.S. 89 (1984) as requiring federal courts to raise Eleventh Amendment immunity on their own without regard to how, or whether, States choose to use that shield. *E.g.*, Wilson-Jones v. Caviness, 99 F.3d 203, 206 (6th Cir. 1996); Gorka, 82 F.3d at 773; Mascheroni v. Bd. of Regents of University of California, 28 F.3d 1554, 1558-59 (10th Cir. 1994). *See also* Smith v. Avino, 91 F.3d 105, 107-08 (11th Cir. 1996). Such a holding in Pennhurst would have not only usurped the States' control of that constitutional guarantee but conflicted with what Patsy said and did only two years earlier. 457 U.S. at 516, n. 19. Pennhurst did not likely overrule or alter the clear holdings of Patsy -- an action the Court ordinarily makes clear (*e.g.*, California v. Acevedo, 500 U.S. 565, 571-79 (1991) -- without either the majority or dissenting opinions citing Patsy. *See* Pennhurst, 465 U.S. 91-124; Pennhurst State School & Hospital v. Halderman, 465 U.S. 125, 125-26 (1984) (Brennan, J., dissenting); Pennhurst State School & Hospital v. Halderman, 465 U.S. 126, 126-67 (1984) (Stevens, Brennan, Marshall & Blackmun, JJ., dissenting).

Reading Pennhurst as conflicting with Patsy is harder to accept with the Court having reconfirmed, since Pennhurst, that Patsy meant what it said. *E.g.*, Collins v. Youngblood, 497 U.S. 37, 41 (1990) (citing Patsy, as having held that an "Eleventh Amendment defense need not be raised and decided by the Court on its own motion"); Idaho, 117 S.Ct. at 2033. While Idaho, for example, recognized that the term "extend" creates a "point of commonality" in U.S. Const. art. III, § 2 and amend. XI and "could suggest that the Eleventh Amendment, like the grant of Article III, § 2, jurisdiction, is cast in terms of reach and competence, so that the federal courts are altogether disqualified from hearing certain suits brought against a State," it soundly rejected that interpretation:



> This interpretation, however, has been neither our tradition nor the accepted construction of the Amendment's text. Rather, a State can waive its Eleventh Amendment protection and allow a federal court to hear and decide a case commenced or prosecuted against it. The Amendment, in other words, enacts a sovereign immunity from suit, **rather than** a nonwaivable limit on the federal judiciary's subject-matter jurisdiction.

Idaho, 117 S.Ct. at 2033, emphasis added. That the State could, and ultimately did, assert Eleventh Amendment immunity against claims Schacht pled was irrelevant to district court jurisdiction at time of removal. *E.g.*, Idaho, 117 S.Ct. at 2033; City of Chicago, 118 S.Ct. at 530.

Eleventh Amendment immunity sufficiently involves jurisdiction that it is never waived by silence or implication. *E.g.*, Edelman v. Jordan, 415 U.S. 651, 678 (1974). States, however, control its use, not plaintiffs or federal courts. The decision below improperly used Eleventh Amendment immunity against defendants by concluding the district court should have denied defendants their right to remove to federal court because the State was entitled to defend against some claims based on Eleventh Amendment immunity.

Read in context, the statement in Pennhurst which some courts viewed as conflicting with Patsy -- "A federal court must examine each claim in a case to see if the court's jurisdiction over that claim is barred by the Eleventh Amendment" -- merely confirmed that, since the State chose, in Pennhurst, to pursue Eleventh Amendment immunity against both federal and pendent claims, federal courts had to respect that **choice** and not restrict the inquiry to the federal claims. 465 U.S. at 121. Admittedly,

the distinctions are confusing. As Justice Thomas observed while an appellate judge:

> Given the wooliness of the concept [of federal jurisdiction], it is hardly surprising that there exists a significant gray area between grounds of decision that clearly are jurisdictional and grounds that clearly are not. . . . [Distinctions made routinely] can prove elusive. [Citations omitted.] . . . To complicate matters further, some provisions --the eleventh amendment, for example--can be jurisdictional in some contexts, and non-jurisdictional in others. *Compare Patsy v. Board of Regents*, 457 U.S. 496, 516, n. 19 . . . (1982) (stating that the eleventh amendment is not "jurisdictional in the sense that it must be raised and decided by this Court on its motion") *with Edelman v. Jordan*, 415 U.S. 651, 678 . . . (1974) ("[T]he Eleventh Amendment defense sufficiently partakes of the nature of a jurisdictional bar so that it need not be raised in the trial court.").

Cross-Sound Ferry Services, Inc. v. I.C.C., 934 F.2d 327, 341 (D.C.Cir. 1991) (Thomas, J., concurring in part).

The confusion remains so infectious that the same judges read these holdings in Edelman, Patsy and Pennhurst as conflicting on some occasions and harmonious on others. *Compare* panel in decision below (J.A. 35) *with* panels in Komyatti, 96 F.3d at 956 and 959 n.4 and Benning, 928 F.2d at 776 and 777, n. 2. The Court should consider reiterating the Collins and Idaho reminders with sufficient prominence here to dispel any further confusion. Eleventh Amendment immunity is not for federal courts to assert on their own -- particularly



**against** States -- and is, instead, as a doctrine protecting the States, exclusively for States to use and control.

Eleventh Amendment immunity is a shield which a State must choose to use before it can block a federal court claim. If the State properly places that shield in the path of that claim, federal courts are constitutionally required to respect that choice and bar the claim. If, by contrast, the State chooses to turn the shield aside, federal courts are constitutionally required to respect that choice. It may be as offensive to State sovereignty for federal courts to usurp the right of States to make that choice, guaranteed to them by the Eleventh Amendment, as to proceed with a claim the State properly seeks to block. A State is not a legal incompetent for whom choices must be made but instead a fellow sovereign capable under, and designated by, the Constitution to make its own choices about allowing claims to proceed against it. *E.g.*, Idaho, 117 S.Ct. at 2033.

The immunity shield guaranteed by the Eleventh Amendment hardly constitutes, as the decision below assumed, an "Achilles' heel" which bars States from using removal statutes. (J.A. 37.) That metaphor is actually a telling disclosure of how far afield the decision below strayed from proper appellate analysis. Eleventh Amendment immunity is not a breach in a State's protective armor by which a losing opponent may, on appeal, fatally defeat the State's removal efforts. *Cf.* Gorka, 82 F.3d at 773 (Eleventh Amendment immunity should only be a shield against State liability). The decision below went farther than even this metaphor allowed. Schacht, unlike Paris who at least had to fire a well-aimed arrow into Achilles' heel, took no action other than plead federal claims which any court would dismiss.

Still, the "Achilles' heel" metaphor is apt -- to describe the effect on a plaintiff's claim when the State chooses to **invoke** Eleventh Amendment immunity. Until the State not only pulls that arrow out of its quiver but

fires it into the unprotected heel of the plaintiff's claim, that claim proceeds through federal court unfettered by Eleventh Amendment immunity. Patsy, 457 U.S. at 516, n. 19. Unlike Achilles, the claim may well be vulnerable to attack from sources other than the arrow of Eleventh Amendment immunity. *E.g.*, Will, 491 U.S. at 66-70. Like Achilles, however, once the arrow is fired and finds its mark, nothing can revive the claim. Neither plaintiffs nor federal courts may pull the arrow from the State's quiver and use it against the State. Unless Congress, through clear and express language, removed that arrow from the State's quiver (*e.g.*, Employees, 411 U.S. at 285), it is for the State to use or choose not to use.

The Seventh Circuit erred in failing to note that the presence of the individual capacity claims sufficed to invoke removal jurisdiction. Instead the decision below deemed district court jurisdiction absent because the State was entitled to assert Eleventh Amendment immunity defenses to other claims. Dismissing Schacht's Section 1983 claims against the State did not need to turn on whether Eleventh Amendment immunity applied since, as with all claims against States under Section 1983, those claims were fatally flawed at the outset simply as a matter of statutory definition. Though the inquiry should have stopped far short of considering Eleventh Amendment immunity, if considered at all, it should have been recognized for what it is: a defense that States may, in their discretion, use and control. The error in the decision below is particularly egregious since the havoc and disruption it created were not mitigated by any arguably good purposes. It cannot be legitimately doubted that the claims against the State will be dismissed on remand just as they were dismissed in federal court. For no apparent reason, defendants, after devoting considerable State resources to demonstrating in federal court that there was absolutely no merit to any of Schacht's claims, are being required to devote further resources to duplicating that effort in State court.



## IV. The claims against the State, properly dismissed in federal district court, would also have been dismissed in State court.

### A. Section 1983 claims against States will be dismissed in federal or State court.

The decision below required remand to State court because Section 1983 claims were subject to Eleventh Amendment immunity even though it acknowledged that Wisconsin courts would have also dismissed those claims. (J.A. 39.) The Wisconsin courts would, without question, have dismissed the claims against the Department and the official capacity claims based either on failure to state claims under Rule 802.06(2)(a)6., Wis. Stats., or on sovereign immunity under Wis. Const. art. IV, § 27, or on both grounds. *E.g.*, Lindas v. Cady, 150 Wis. 2d 421, 431, 441 N.W.2d 705 (1989) (State agency not suable for monetary relief under Section 1983 since "states are not 'persons' within the meaning of sec. 1983"); Lindas v. Cady, 142 Wis. 2d 857, 861-62, 419 N.W.2d 345 (Ct. App. 1987), *aff'd in part and rev'd in part*, 150 Wis. 2d 421, 441 N.W.2d 705 (1989). *See also* Boldt v. State, 101 Wis. 2d 566, 584-85, 305 N.W.2d 133 (1981) ("There is no provision in the Wisconsin Statutes giving consent to sec. 1983 or other civil rights actions" against a State agency).

Since the State is not a "person" under Section 1983, the claims potentially barred by sovereign immunity simply failed to state any claim on which relief may be granted. *Compare* Fed.R.Civ.P. 12(b)(6) *with* Rule 802.06(2)(a)6., Wis. Stats. Will, addressing Section 1983 claims made against a State in its own courts, recognized that the definitional analysis, standing alone, always defeats those claims. 491 U.S. at 63-66. Given this definitional bar, what should a district court do with Section 1983 claims made against a State in a removed

action? Weinberger v. State of Wisconsin, 906 F.Supp. 485, 491 (W.D.Wis. 1996), *aff'd*, 105 F.3d 1182, 1185 (7th Cir. 1997) took the proper approach. Section 1983 claims were made against the State of Wisconsin, the plaintiff argued that "defendants should not be permitted to assert Eleventh Amendment immunity because they removed this case from state court" and the district court responded:

> It is true that the Eleventh Amendment is a bar to federal jurisdiction [citation omitted] and has no operative effect in the state courts, but plaintiff's state court suit against the state and against its employees in their official capacities would have gone aground for other reasons. In state court [in Wisconsin], the principle of sovereign immunity protects the state [of Wisconsin] from being sued without its consent. Moreover, neither the state nor its officials acting in their official capacities can be sued under § 1983 in **any** court, state or federal, because they are not "persons" under § 1983. [Citation omitted.] Therefore, even if defendants had not removed this case [from Wisconsin circuit court], plaintiff **could not have** proceeded against the state or against defendant Chester in her official capacity under § 1983.

906 F.Supp. at 491, emphasis added. The appellate court, reviewing the district court decision in Weinberger, noted these sovereign immunity rulings with approval and without, as here, questioning the propriety of removal. 105 F.3d 1182, 1185 (7th Cir. 1997). The Seventh Circuit, in January 1997, affirmed the district court disposition in its entirety (105 F.3d at 1182-88) only to treat the same situation here in an inexplicably contrary fashion in June 1997 (J.A. 35-40.) Weinberger had it right.



### B. There was, and is, no need to determine if there is a futility exception to removal statutes.

The Seventh Circuit decision, as in Weinberger, recognized that Wisconsin courts would have dismissed the Section 1983 claims against the State. Unlike in Weinberger, it concluded the district court did not have removal jurisdiction and that Primate Protection League v. Tulane, 500 U.S. 72 (1991) required remand to the State court even though remand was futile. (J.A. 39.) The district court here did have removal jurisdiction and, even if it had not, Primate Protection League does not mandate futile State court remands. Though the Court need not revisit Primate Protection League here, it may, in light of Schacht's exclusive focus on that issue in responding to the petition, wish to assure that question is at least left open for resolution in a future case which more clearly sharpens the competing interests and principles.

Primate Protection League turned on the district court having lacked removal jurisdiction and asked, but did not answer, the question of whether district courts lacking removal jurisdiction must remand to State court when remand would be futile. 500 U.S. at 89. It deemed State court remand necessary, where removal jurisdiction is absent, because of legal and factual "uncertainties" about how the State courts would resolve the claims involved. 500 U.S. at 89. It took "note" that the literal language of 28 U.S.C. § 1447(c) seemed to require remand where the district court lacked jurisdiction but grounded its decision on these uncertainties. *Id.*, 500 U.S. at 89.

The subsequent history of Primate Protection League suggests that, where remand of a removed claim would clearly be futile, a district court should dismiss regardless of whether it had removal jurisdiction. *See* In re Adm'rs of the Tulane Educational Fund, 954 F.2d 266

(5th Cir. 1992), *on remand*, Primate Protection League v. Tulane, 1992 WL 329555 (E.D.La. 1992), *aff'd* 22 F.3d 1094 (5th Cir. 1994), *reh. and reh. en banc denied*, 25 F.3d 1046 (5th Cir. 1994), *cert. denied*, 513 U.S. 1032 (1994). After remand to State court, the case was again removed to the district court. In re Adm'rs of the Tulane Educational Fund, 954 F.2d at 267-68. The district court, concluding that the uncertainties identified in Primate Protection League remained unresolved, remanded to State court once again. In re Adm'rs of the Tulane Educational Fund, 954 F.2d at 268. The appellate court granted mandamus and vacated this second remand order. 954 F.2d at 270 ("The Supreme Court merely declined to speculate on hypothetical circumstances that were not then before it. The problem is now a concrete one . . . .) The Court having declined to review that subsequent Fifth Circuit decision merely meant that, exercising its sound discretion, less than four Justices voted in favor of review. *E.g.*, Maryland v. Baltimore Radio Show, 338 U.S. 912, 917-18 (1950). In that context, Primate Protection League, however, hardly precludes any futility exception in removal cases. (J.A. 39.)

The Third Circuit viewed the comments in Primate Protection League about a futility exception as *dicta* which merely raised, rather than answered, questions. *E.g.*, Bromwell v. Michigan Mutual Insurance Co., 115 F.3d 208, 214 (3rd Cir. 1997) (Primate Protection League "in *dicta*, expressed a reluctance to recognize" a futility exception in removal cases). Other than the Seventh Circuit, the Fourth Circuit has read those comments as a blanket holding that there can never be a "futility exception" to 28 U.S.C. § 1447. *E.g.*, Roach v. West Virginia Regional Jail and Correctional Facility Authority, 74 F.3d 46, 49 (4th Cir. 1996). This court may wish to assure that this question, if not addressed in this case, is left open for resolution in a future case which more clearly sharpens the competing interests and principles.



## V. The decision below not only lacks any valid legal support and breaches vital constitutional and statutory guarantees but disrupts effective judicial administration.

Beyond lacking any valid legal grounding and turning vital constitutional and statutory guarantees on their head, the decision below also disrupts effective judicial administration. The decision below is both wrong on theory and wrong in practice.

Frances J., from which the decision below derived, was driven by a perception that the State of Illinois removed a case to federal court to avoid addressing the merits of a particular claim, barred in federal court, as to which no similar State court bar existed. 19 F.3d at 342-43. Judicial amendment of removal statutes and constitutional immunity protections, however, as occurred in Frances J., is not an accepted way to remedy the rare occasion when immunity protections might be manipulated. Behrens v. Pelletier, 116 S.Ct. 834, 840-41, text and nn. 3 and 4 (1996) pointed out that immunity protections should not be diminished to avoid misuse of those protections and that the rare occasions when misuse occurs are easily addressed by the supervisory authority of courts. The open State law question in Frances J. -- whether sovereign immunity would have barred that action in State court (19 F.3d at 342-43) -- could, for example, have been answered surgically, without judicially amending general removal standards, through remand based on abstention. *E.g.*, Huffman, 420 U.S. at 603-08.

Concern that an immunity guarantee may be abused is no reason to destroy the guarantee. It is instructive to recall that Chisholm v. Georgia, 2 Dall. 419 (1793), restricted State sovereign immunity based partly on judicial concern that States could misuse their common law immunity guarantees. Chisholm, 2 Dall. at 456 ("A

dishonest State" should not be able to "insult . . . justice, by declaring *I am a SOVEREIGN State*"). Chisholm "'fell on the country with [such a] profound shock' . . . that the Eleventh Amendment was at once proposed and adopted." B. Schwartz, A History of the United States Supreme Court 21 (1993). *See* Edelman, 415 U.S. at 660-62 (history of how Chisholm caused the Eleventh Amendment).

The decision below so completely turns the protective nature of Eleventh Amendment immunity on its head that district courts bound by Frances J. and its progeny have not read their holdings as broadly as the Seventh Circuit did here. *E.g.*, Smith v. Milwaukee County, 954 F.Supp. 1314, 1318, text and n.4 (E.D.Wis. 1997) (noting holdings in Frances J. and Gorka but declining to remand because the plaintiff there did not object to removal and Eleventh Amendment, though available, was not raised); Weinberger, 906 F.Supp. at 491, *aff'd*, 105 F.3d at 1185.

Even other panels of the Seventh Circuit are apparently so uncomfortable with the consequences of the Frances J. holdings that, examining procedural settings similar to the one addressed in the decision below, they reach contrary conclusions. *E.g.*, Gossmeyer v. McDonald, 128 F.3d 481, 487-89 (7th Cir. 1997) (although official capacity claims were pled in complaint as removed, finding, without citing Schacht, that Frances J. did not require remand to State court); Smith v. Wisconsin Dept. of Agriculture, 23 F.3d 1134, 1139 (7th Cir. 1994) (in a removed action, only the claims against the State were remanded to State court and the district court disposition of other claims affirmed); Weinberger, 105 F.3d at 1185, *aff'g* Weinberger, 906 F.Supp. at 491 (affirming the district court having, in a removed action, granted summary judgment, based on Eleventh Amendment immunity, on claims against State).



Eleventh Amendment immunity allows States, at their option, to avoid the indignity of being subjected to a suit. *E.g.*, Puerto Rico Authority v. Metcalf & Eddy, 506 U.S. 139, 146 (1993). The reasoning of the decision below actually subjects States, and any defendant sued with States, to multiple suits by punishing States for being entitled to Eleventh Amendment immunity. The decision below invites State court litigation, to eliminate claims potentially barred by sovereign immunity, followed by removal to federal court to litigate the remaining claims. It also invites prompt federal court removal where vague pleadings make the bar of sovereign immunity uncertain, to assure removal rights are not lost, followed by federal court litigation on whether that bar exists, State court remand if it does, and ultimately a remand back to federal court once immunity bars are excised. To avoid such indignity to States, and collateral damage to their co-defendants, in the future, the Court should clarify that the potential bar of Eleventh Amendment immunity never deprives a district court of removal jurisdiction under 28 U.S.C. § 1441.

A district court in the Fourth Circuit, which has adopted the Seventh Circuit approach used below, recently expressed dismay at having to hew to that approach by remanding a removed action because, as here, Section 1983 claims against a State were potentially barred by Eleventh Amendment immunity. Lowery v. Prince George's County, Md., 960 F.Supp. 952, 957-59 (D.Md. 1997). Lowery correctly characterized this remand as a "pyrrhic victory" for the plaintiff since those claims would unquestionably be dismissed in any court based on the State not being a "person" under Section 1983. 960 F.Supp. at 959.

The pyrrhic victory for the plaintiff, in Lowery as here, was an actual defeat for our federalist system. The disruption to the careful balance required to maintain that system is detectable, for example, just by examining appealability issues. A State, to preserve its dignatory

interests, has a right to immediately appeal from interlocutory denials of Eleventh Amendment immunity. *E.g.*, Puerto Rico Authority, 506 U.S. at 146. If the decision below stands, however, a State would have **no** appeal from district court remands under 28 U.S.C. § 1447(c) when Eleventh Amendment immunity is used against States to prevent removal. *E.g.*, Thermtron Products, Inc. v. Hermansdorfer, 423 U.S. 336, 342-43 (1976) (no appeal when remand, even if erroneous, is purportedly based on 28 U.S.C. § 1447(c)).

It can hardly be said errors would not occur in determining Eleventh Amendment immunity issues. Plaintiffs sometimes allege "official capacity" claims so vaguely that it takes years, and multiple levels of courts, to sort out the allegations. *E.g.*, Shockley v. Jones, 823 F.2d 1068, 1070-72 (7th Cir. 1987) (difficult to detect Eleventh Amendment problems in vague pleadings); Jensen v. State Bd. of Tax Com'rs of State of Indiana, 763 F.2d 272, 278 (7th Cir. 1985) (same). The decision below creates a rule under which an action may have to proceed through an entire State court system, to determine if State sovereign immunity bars a federal law claim, before the action can be removed to federal court. If the defendants guess correctly that the complaint alleged a claim barred by sovereign immunity, it could be years after the complaint is filed before removal is allowed. If the defendants guess incorrectly that the complaint alleged a claim barred by sovereign immunity, they would have forfeited the removal right years earlier. If defendants promptly remove to federal court as a precaution, and the federal courts ultimately determine a claim was barred by immunity, all of the effort expended, as in this case, will have been wasted. This is no way to run a judicial system.

Federal courts will, at times, properly examine removed complaints to determine whether plaintiffs tried to avoid removal by "'artful[ly] casting their essentially federal law claims' as state-law claims." Federated



Department Stores, Inc. v. Moitie, 452 U.S. 394, 397, n.2 (1981). Federal courts also take care, as a general matter, to assure "compliance with the intent of Congress [is not] avoided through mere artful pleading." Chicago & Northwestern Transportation Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 324 (1981).

The decision below, if it stands, would indiscriminately reward both artful and artless pleading for, either intentionally or inadvertently, making fatally flawed federal claims against States. Patently frivolous or baseless claims against States would, under the reverse logic articulated by the Seventh Circuit, bar **States** and their officials from exercising rights Congress intended to grant all defendants.

The central problem with the decision below is that neither a sovereign State nor defendants sued with States should be treated as second-class litigants when federal claims are made against it. State officials, distracted from the public's business to defend against baseless claims seeking to hold them personally liable, should not, **because** they are public servants and also sued officially, be deprived of rights which all defendants are guaranteed. An alternative approach more respectful of state sovereignty would view Eleventh Amendment immunity as a shield which States can use, not a weapon to be used against States and any defendant sued with States.

Simply because of the individual capacity claims, the district court plainly had removal jurisdiction. Since Section 1983 claims against the State may be dismissed as a matter of statutory definition, Eleventh Amendment immunity need never have been considered. Even in cases where the only bar to a federal claim is Eleventh Amendment immunity, however, it is for the State, not plaintiffs or any federal court, to assert and pursue that bar. Beyond being unsupported by valid legal principles and disruptive to vital constitutional and statutory

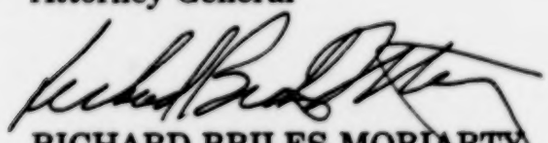
guarantees, the decision below promotes wasteful and ineffective judicial administration. Applying its "due concern for the Eleventh Amendment's role as an essential component of our constitutional structure" (Dellmuth, 491 U.S. at 228) and its supervisory authority over the federal courts, this Court should not allow the Seventh Circuit decision to stand.

## CONCLUSION

Defendants ask that the decision below be reversed.

Respectfully submitted,

JAMES E. DOYLE
Attorney General



RICHARD BRILES MORIARTY
Assistant Attorney General
State Bar No. 1017190

Attorneys for Petitioners

Wisconsin Department of Justice
Post Office Box 7857
Madison, Wisconsin 53707-7857
(608) 267-2796